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COMMENT

Interlocutory Appeals Under the Federal Arbitration Act and the Effect on the District Court's Proceedings

I. Introduction

Buried in the pages of many modern contracts are agreements to arbitrate any existing or future disputes that may arise. These arbitration provisions may appear innocuous, but when a subsequent dispute develops between the contracting parties and one party fails to comply with the arbitration provisions, turmoil ensues. The party wishing to arbitrate must request that the court enforce the contract and mandate that the parties resolve the dispute through arbitration. Before issuing that mandate, the court must determine the validity of the arbitration provision in question and whether the arbitration provision even covers the dispute involved.¹ This process culminates with the court issuing a ruling on whether to compel arbitration. If the court denies the motion to compel arbitration and instructs the parties to proceed to litigation, the party wishing to arbitrate has an immediate opportunity to appeal.² Whether the lower court's proceedings should be stayed pending the outcome of the appeal or whether the lower court should proceed consistent with its ruling that the dispute is not arbitrable is unclear. Currently, the circuits are split on the proper outcome under the Federal Arbitration Act (FAA), which governs arbitration issues in the Federal Courts.³

The United States Congress intended the FAA to place arbitration agreements "upon the same footing as other contracts" and to reverse a general distrust of arbitration by the judiciary while promoting an efficient business practice.⁴ Section 2 of the FAA codifies this intent by stating that "a written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable."⁵

1. 9 U.S.C. §§ 3-4 (2000).

2. *See id.* § 16.

3. *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1160 (10th Cir. 2005). The FAA is codified in 9 U.S.C. §§ 1-307 (2000 & Supp. IV 2004).

4. H.R. REP. NO. 68-96, at 1-2 (1924); *see also* Comm. on Commerce, Trade & Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 155-56 (1925); Todd Baker, Comment, *Arbitration in the 21st Century: Where We've Been, Where We're Going*, 53 OKLA. L. REV. 653, 658 (2000).

5. 9 U.S.C. § 2.

To further the purpose of making arbitration agreements enforceable, Congress amended the FAA in 1988 to allow for an interlocutory appeal of decisions denying a motion to compel arbitration and decisions refusing to stay proceedings pending arbitration.⁶ The drafters of the 1988 amendment sought to cure the “overload” of cases in the federal courts and the inadequate opportunity for parties to seek justice through the courts.⁷ Moreover, the drafters of the amendment sought to encourage the enforcement and utilization of alternative “dispute resolution, such as arbitration.”⁸

The FAA, however, does not address whether an interlocutory appeal under § 16 stays the district court’s proceedings pending the appeal.⁹ The Second and Ninth Circuits have held that arbitrability is separate from the merits of the case, and thus, an appeal from a denial of a motion to compel arbitration does not necessarily stay the district court’s proceedings.¹⁰ Conversely, the Seventh, Tenth, and Eleventh Circuits have held that arbitrability is so interrelated to the merits of the case that the district court’s proceedings should be stayed unless the appeal is frivolous.¹¹ Neither approach, however, has adequately introduced a workable solution. This comment argues that, based on the Supreme Court’s willingness to construe arbitration agreements broadly to encompass many types of disputes and the goal of the FAA to make arbitration an effective remedy to a contract breach,¹² district courts should stay proceedings pending the appeal of the district court’s ruling about whether the dispute is subject to the arbitration agreement, except where a party is predominately using arbitration as a means to stall proceedings and deny another access to justice. Additionally, before a court determines that a case falls within this exception, the court must take an affirmative step, such as conducting a hearing to ascertain whether arbitration is being used improperly.

6. Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, sec. 1019, § 15, 102 Stat. 4642, 4670-71 (codified as amended at 9 U.S.C. § 16).

7. H.R. REP. NO. 100-889, at 22 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5982, 5983.

8. *Id.* at 23, *as reprinted in* 1988 U.S.C.C.A.N. at 5983.

9. *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1160 (10th Cir. 2005).

10. *Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2d Cir. 2004); *Britton v. Co-op Banking Group*, 916 F.2d 1405 (9th Cir. 1990).

11. *McCauley*, 413 F.3d 1158; *Blinco v. Green Tree Servicing, L.L.C.*, 366 F.3d 1249 (11th Cir. 2004) (*per curiam*); *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504 (7th Cir. 1997).

12. *See Moses H. Cone Mem’l Hosp. v. Mercury Constr.*, 460 U.S. 1, 24-25 (1983) (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”); STEPHEN J. WARE, *ALTERNATIVE DISPUTE RESOLUTION* § 2.4, at 23 (2001); *id.* § 2.28, at 63-64.

Part II of this comment provides a brief overview of arbitration and its history in the United States, culminating in the FAA's adoption. Part II also discusses the development of the FAA and the U.S. judiciary's shift toward favoring arbitration as a remedy in most types of cases. Part III addresses the current split in the U.S. courts of appeals and analyzes the respective circuits' rationales for favoring one alternative over another. Part IV of this comment analyzes the circuits' approaches in the context of the original policy objectives behind the passage of the FAA and the current judiciary's policy of favoring arbitration and suggests an alternative standard to rectify the current circuit split.

II. Arbitration and the Federal Arbitration Act

A. A Brief Overview of Arbitration

Arbitration is a private adjudication of disputes between opposing parties.¹³ Arbitration is private in two respects.¹⁴ First, arbitration is nongovernmental as it arises from a contract between the parties and presided over by a nonjudicial arbitrator.¹⁵ Second, and arguably more importantly, the arbitration proceedings are usually secret and confidential per the terms of the parties' contract.¹⁶

Arbitration can arise in either a contractual or noncontractual setting.¹⁷ Noncontractual arbitration is rarely binding, if at all, because of an individual's Seventh Amendment right to a trial by jury.¹⁸ The application of noncontractual arbitration is beyond the scope of this comment because the FAA only addresses contractual arbitration.¹⁹

Contractual arbitration can be binding because courts allow a party to waive his or her right to a jury trial.²⁰ In contractual arbitration, the arbitration agreement specifies the applicable law and procedural rules that will be applied during arbitration.²¹ The arbitration agreement may also provide that the parties will select an arbitrator to oversee the proceedings.²²

13. See Baker, *supra* note 4, at 653.

14. WARE, *supra* note 12, § 2.1, at 19.

15. *Id.*

16. *Id.*

17. *Id.* § 2.2, at 19.

18. For a discussion regarding the validity of binding noncontractual arbitration, see *id.* § 2.55, at 113-17.

19. See 9 U.S.C. § 2 (2000) (addressing the "[v]alidity, irrevocability, and enforcement of agreements to arbitrate" (emphasis added)).

20. WARE, *supra* note 12, § 2.2, at 19.

21. *Id.* § 2.3, at 21.

22. Section 5 of the FAA states that if the agreement contains "a method of naming or

In the absence of such a provision, the court, pursuant to authority granted by the FAA, will select an arbitrator to oversee the proceedings.²³ The arbitrator adjudicates the dispute just as a judge or jury adjudicate in a trial.²⁴ Finally, the arbitration agreement will generally provide that neither party may discuss the arbitration proceedings or the matters discussed during the proceedings.²⁵

Once the arbitrator renders his award, the courts enforce the award, but have limited ability to review or modify it.²⁶ The courts can review or modify the award only “[w]here the award was procured by corruption, fraud, or undue means”; where the arbitrators were not independent; where the arbitrators exceeded their powers or acted in a way to prejudice the proceedings; or where the award does not adequately resolve the dispute in question.²⁷

B. Development of Arbitration and the Federal Arbitration Act

Merchants have used arbitration as far back as the medieval period to resolve disputes,²⁸ and forms of arbitration have existed in the United States since the colonial period.²⁹ The early American attempts at arbitration were motivated by a general distaste of formal, adversarial litigation.³⁰ These attempts sought the formation of a dispute resolution process that offered “harmony and peace” while still producing binding judgments.³¹ Moreover, early arbitration was an effort to provide everyday citizens a means to access justice that was simple and did not include lawyers or their “esoteric language.”³² Even so, not until 1920 did an American state codify an arbitration act that made agreements to arbitrate existing and future disputes

appointing an arbitrator . . . such method shall be followed.” 9 U.S.C. § 5. However, “if no method [is] provided” or if the method is ineffective, “then upon the application of either party . . . the court shall . . . appoint an arbitrator.” *Id.* The court appointed arbitrator “shall act . . . with the same force and effect as if he or they had been specifically named” in the agreement. *Id.*; see also WARE, *supra* note 12, § 2.36, at 76.

23. 9 U.S.C. § 5; see also WARE, *supra* note 12, § 2.36, at 76.

24. WARE, *supra* note 12, § 2.1, at 19.

25. *Id.*

26. *Id.* § 2.3, at 21.

27. 9 U.S.C. §§ 10-11 (2000 & Supp. IV 2004).

28. Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 793 (2002).

29. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 45 (2d ed. 1985) (stating that disputes were mediated in Massachusetts as early as 1636).

30. *Id.* at 45, 95.

31. *Id.*

32. *Id.*

binding and enforceable in state courts.³³ Following suit, Congress enacted the FAA in 1925, making arbitration provisions binding and enforceable in federal courts.³⁴

Prior to the FAA's passage, many courts either would not enforce arbitration provisions,³⁵ or would only award nominal damages for the breach of an agreement to arbitrate.³⁶ The courts' hostility arose from what they saw as an encroachment on the judiciary.³⁷ *Munson v. Straits of Dover S.S. Co.* evidences the judiciary's hostility.³⁸ In *Munson*, the parties agreed to submit all disputes that may have arisen from the transaction to a panel of three arbitrators,³⁹ and the arbitrators' decision was intended to be final.⁴⁰ A dispute arose, but one of the parties refused to arbitrate and filed suit in admiralty.⁴¹ After the trial concluded, the party that had wished to arbitrate petitioned the court for damages based on the failure of the other party to arbitrate.⁴² In denying the petition, the Second Circuit noted that even though covenants to arbitrate future disputes were common, no cases existed that awarded damages solely on the fact that one of the parties refused to arbitrate.⁴³ The Second Circuit reasoned that the lack of cases awarding damages for a refusal to arbitrate was understandable because of the "impossibility of proving substantial damages."⁴⁴ The Second Circuit ultimately held that the party wishing to arbitrate could not prove anything more than nominal damages even though the cost of arbitration would have been "much less."⁴⁵

In contrast to the lack of redress available in early courts, the FAA's pro-contract position requires courts to order specific performance as the remedy for a breach of an arbitration agreement.⁴⁶ The FAA's stated purpose "was

33. Pittman, *supra* note 28, at 797, 799. The state was New York. *Id.* See generally Civil Practice Act, ch. 925, §§ 1410-1431, [1920] 4 N.Y. Laws 473 (codified as amended at N.Y. C.P.L.R. 7501-7514 (McKinney 1998 & Supp. 2007)).

34. Baker, *supra* note 4, at 653.

35. *Id.* at 655.

36. See *Munson v. Straits of Dover S.S. Co.*, 102 F. 926, 928 (2d Cir. 1900) (holding that the appellant was only entitled to nominal damages); see also WARE, *supra* note 12, § 2.4, at 23 n.32 (discussing the result in *Munson*).

37. Baker, *supra* note 4, at 655.

38. *Munson*, 102 F. at 926.

39. *Id.* at 927.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 928.

46. WARE, *supra* note 12, § 2.4, at 23.

to create a procedural rule favoring the enforcement of arbitration agreements in federal courts” and thus reverse a history of judicial hostility toward arbitration and the enforcement of arbitration agreements.⁴⁷ The FAA placed arbitration agreements “upon the same footing as other contracts.”⁴⁸ To this end, the FAA encouraged the judiciary to properly enforce all contracts equally, including those contracts containing agreements to arbitrate existing and future disputes.⁴⁹

In addition to reversing judicial hostility toward arbitration agreements, the drafters of the FAA also sought to encourage what they saw as an efficient business practice that cured many “evils.”⁵⁰ First, the drafters saw arbitration as a way to eliminate the delay associated with litigation because some disputes can take several years of litigation before being fully adjudicated.⁵¹ Second, the drafters saw arbitration as less expensive alternative to litigation.⁵² Finally, the drafters viewed arbitration as more efficient because of its nontraditional remedies.⁵³ The FAA accomplishes these objectives by enforcing arbitration agreements that place limits on discovery, evidentiary standards, and other procedural rules and by allowing an arbitrator significant freedom in crafting arbitration awards.⁵⁴ Moreover, all of the drafters’ beliefs about arbitration continue to find judicial support today.⁵⁵

Simply, the FAA “make[s] [a] contracting party live up to his agreement.”⁵⁶ Otherwise, the breaching party could decide never to arbitrate

47. Baker, *supra* note 4, at 653.

48. H.R. REP. NO. 68-96, at 1 (1924); *see also* Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989) (“The [Federal Arbitration] Act was designed ‘to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate.’” (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 (1985))); WARE, *supra* note 12, § 2.4, at 22.

49. H.R. REP. NO. 68-96, at 2 (“[C]ourts have felt that the precedent was too strongly fixed to be overturned without legislative enactment . . .”).

50. Baker, *supra* note 4, at 658; *see also* Comm. on Commerce, Trade & Commercial Law, *supra* note 4, at 155.

51. Comm. on Commerce, Trade & Commercial Law, *supra* note 4, at 155; *see also* H.R. REP. NO. 68-96, at 2; Baker, *supra* note 4, at 658.

52. Comm. on Commerce, Trade & Commercial Law, *supra* note 4, at 155; *see also* H.R. REP. NO. 68-96, at 2; Baker, *supra* note 4, at 658.

53. Comm. on Commerce, Trade & Commercial Law, *supra* note 4, at 156; Baker, *supra* note 4, at 658.

54. WARE, *supra* note 12, § 2.3, at 21; Comm. on Commerce, Trade & Commercial Law, *supra* note 4, at 156.

55. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (stating that, by agreeing to arbitrate, a party merely “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration”).

56. H.R. REP. NO. 68-96, at 1.

while the other party is left with little judicial recourse. Sections 3 and 4 of the FAA codify the mandate of specific performance for a breach of an arbitration provision. Section 4 states,

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which . . . would have jurisdiction under title 28 . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . [T]he court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.⁵⁷

Section 3 fulfills the mandate of specific performance by stating,

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement⁵⁸

Moreover, to make this mandate of specific performance an effective remedy, Congress subsequently amended the FAA to make the denial of a motion to compel arbitration or a motion to stay proceedings pending arbitration immediately appealable under § 16 of the FAA.⁵⁹ Without this provision, the party moving to compel arbitration would have to litigate the entire dispute before seeking review of the district court's decision not to compel arbitration. This result would effectively deny that party the benefit of the bargain.⁶⁰ As the U.S. Supreme Court has stated, "[s]uch a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate."⁶¹

57. 9 U.S.C. § 4 (2000).

58. *Id.* § 3.

59. Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, sec. 1019, § 15(a)(1)(A)-(B), 102 Stat. 4642, 4670-71 (codified as amended at 9 U.S.C. § 16(a)(1)(A)-(B)). Section 1019 was originally codified at 9 U.S.C. § 15, *see* 9 U.S.C. § 15 (1988), and was renumbered as § 16 by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 325(a)(1), 104 Stat. 5089, 5120.

60. H.R. REP. NO. 68-96, at 2 ("[T]he party willing to perform his contract for arbitration is not subject to the delay and cost of litigation.").

61. *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984).

Congress left unchanged, however, a litigant's ability to appeal a district court's decision in favor of arbitration, but this is understandable based on the previous judicial decisions regarding arbitration.⁶² The drafters of § 16 did not fear that the judiciary would erroneously enforce arbitration agreements.⁶³ Additionally, proceeding with arbitration raises few practical concerns because any discovery and preparation done for arbitration will benefit the parties if the decision to compel arbitration is later overturned and the dispute later litigated.⁶⁴ This policy of erring on the side of arbitration is shown by the U.S. Supreme Court's statement that "[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, a concern which 'requires that we rigorously enforce agreements to arbitrate.'"⁶⁵ Overall, the bifurcation of § 16 encourages arbitration and "prevent[s] parties from frustrating arbitration through lengthy, preliminary appeals."⁶⁶

Congress's goals for the FAA have been largely realized. Since the FAA's adoption in 1925, it has become one of the most important U.S. sources of arbitration law.⁶⁷ In addition, the U.S. judiciary has almost completely reversed its view on the enforcement of arbitration agreements.⁶⁸

C. The U.S. Judiciary's Current Stance on Arbitration Agreements

The FAA grants the courts power to determine whether a dispute is subject to an arbitration agreement.⁶⁹ Courts derive this power from the language of § 3, which states that "*upon being satisfied that the issue involved in such suit*

62. 9 U.S.C. § 16(b) (providing that interlocutory appeals from decisions favoring arbitration are only allowed if permissible under 28 U.S.C. § 1292(b)). See generally Edith H. Jones, *Appeals of Arbitration Orders-Coming Out of the Serbonian Bog*, 31 S. TEX. L. REV. 361 (1990) (providing an overview of the appeals process).

63. Jones, *supra* note 62, at 375-76.

64. *Id.* But see *Bailey v. Ameriquest Mortgage Co.*, No. CIV. 01-545, 2002 WL 1835642, at *1-2 (D. Minn. Aug. 5, 2002) (allowing discovery for litigation because it was commenced before the appeal and would benefit the parties regardless of the forum in which the dispute was ultimately resolved).

65. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (first alteration in original) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

66. 3 THOMAS H. OEHMKE, OEHMKE COMMERCIAL ARBITRATION § 157:15, at 157-34 (3d ed. 2006).

67. WARE, *supra* note 12, § 2.4, at 22.

68. Pittman, *supra* note 28, at 881 ("[T]he Court . . . continued its own policy of favoring arbitration over court adjudication." (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-90 (2000))).

69. 9 U.S.C. § 3 (2000).

or proceeding is referable to arbitration under such an agreement, [the court] shall . . . stay the trial of the action until such arbitration has been had."⁷⁰

The U.S. Supreme Court has shown a willingness to interpret arbitration agreements broadly to encompass a wide array of disputes. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,⁷¹ the Court held that determining whether a dispute is subject to arbitration involves a two-step inquiry.⁷² First, a court must determine whether the arbitration agreement covers the issue in dispute.⁷³ If so, a court must then determine whether an external legal constraint forecloses the arbitration of those claims.⁷⁴

Addressing the first prong, the Court held that in determining whether the arbitration agreement covers the dispute, "the parties' intentions [should] control, but those intentions are *generously construed* as to issues of arbitrability."⁷⁵ The Court further stated that the FAA manifests a congressional policy requiring courts to liberally construe agreements to arbitrate.⁷⁶ The Court reached a similar conclusion two years earlier in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*⁷⁷ In *Moses*, the Court stated that the policies underlying the adoption of the FAA require a liberal reading of arbitration agreements,⁷⁸ and courts should resolve ambiguous issues in favor of enforcing arbitration.⁷⁹

As for the second part of the inquiry — whether external legal constraints foreclose arbitration — the Supreme Court has held, since the 1980s, that almost any type of claim is arbitrable, and the party opposing arbitration must show a clear congressional intent to exclude a claim from arbitration before the courts will deny a motion to compel arbitration.⁸⁰ In fact, the Supreme Court has expanded the FAA's application to contracts specifically excluded by § 1 of the FAA.⁸¹ The Court has accomplished this expansion through two main avenues. First, the Supreme Court has interpreted the phrase "evidencing a transaction involving commerce" found in § 2 of the FAA to

70. *Id.* (emphasis added).

71. 473 U.S. 614 (1985).

72. *Id.* at 628.

73. *Id.*

74. *Id.*

75. *Id.* at 626 (emphasis added).

76. *Id.* at 627.

77. 460 U.S. 1 (1983).

78. *Id.* at 23 n.27.

79. *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989); *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25.

80. *WARE*, *supra* note 12, § 2.27, at 61 (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987)).

81. *Baker*, *supra* note 4, at 669.

encompass anything “affecting commerce,” thus stretching the FAA’s application to almost all transactions.⁸² Second, the Supreme Court has narrowly interpreted the FAA’s clause exempting “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” from arbitration,⁸³ limiting this exemption to cover only “employment contracts of transportation workers.”⁸⁴ One notable exception to this doctrine of expansion, however, is the Ninth Circuit’s refusal to apply this broad brush by holding that claims involving employment discrimination under Title VII of the Civil Rights Act of 1964 are not subject to arbitration.⁸⁵

*Gilmer v. Interstate/Johnson Lane Corp.*⁸⁶ provides an example of the courts’ expansion of arbitrable claims. The defendant in *Gilmer* hired the plaintiff as a financial services manager.⁸⁷ As a condition of employment, the plaintiff registered with the New York Stock Exchange,⁸⁸ and the registration agreement contained a provision stating that the plaintiff “agree[d] to arbitrate any dispute, claim or controversy arising between him and [the defendant].”⁸⁹ Subsequently, the defendant terminated the plaintiff’s employment.⁹⁰ In response, the plaintiff filed a claim of age discrimination with the Equal Employment Opportunity Commission and brought suit alleging a violation of the Age Discrimination in Employment Act (ADEA).⁹¹ The defendant moved to compel arbitration of the ADEA claim,⁹² but the district court denied the defendant’s motion based on the belief that Congress intended to protect ADEA claimants from waiving their right to have their disputes

82. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995) (emphasis omitted); see also Michael G. McGuinness & Adam J. Karr, *California’s “Unique” Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61, 71 (2005) (“Allied-Bruce tied the scope of the FAA to the outer limits of the Commerce Clause, rather than to the vagaries of contractual intent.”).

83. 9 U.S.C. § 1 (2000).

84. McGuinness & Karr, *supra* note 82, at 72 (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001)).

85. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1196-97 (9th Cir. 1998).

86. 500 U.S. 20 (1991).

87. *Id.* at 23.

88. *Id.*

89. *Id.* (first alteration in original) (internal quotation marks omitted).

90. *Id.*

91. *Id.* at 23-24.

92. *Id.* at 24.

settled in a judicial forum.⁹³ The U.S. Court of Appeals for the Fourth Circuit, however, reversed the trial court's decision to deny arbitration.⁹⁴

On certiorari to the U.S. Supreme Court, the Court reiterated the FAA's original purpose of "revers[ing] the longstanding judicial hostility to arbitration agreements that had existed . . . by American courts, and [of] plac[ing] arbitration agreements upon the same footing as other contracts."⁹⁵ The Court rejected the defendant's contention that the plaintiff's claim was not subject to arbitration because § 1 of the FAA specifically exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from being subject to arbitration by narrowly construing the term "contracts of employment" to exclude the registration agreement.⁹⁶

The Court then affirmed its previous holdings that the FAA manifests a policy favoring arbitration agreements.⁹⁷ In addition, the Court stated that it is well settled that statutory claims may be submitted to arbitration.⁹⁸ In the Court's view, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; [the party] only submits to their resolution in an arbitral, rather than a judicial, forum."⁹⁹ The Court noted that even though "all statutory claims may not be appropriate for arbitration," the courts should hold parties to their arbitration agreements unless Congress has granted a specific exception.¹⁰⁰ Moreover, the party disputing arbitration bears the burden of showing that Congress has provided such an exception.¹⁰¹

Furthermore, the Court validated arbitration and its importance in dispute resolution, recognizing arbitration provisions as a valid means of selecting a forum for dispute resolution.¹⁰² First, knowledgeable arbitrators, like judges, are presumed to be independent conduct arbitrations.¹⁰³ Additionally, if an arbitrator's independence is questioned, the courts have the ability to overturn

93. *Id.*

94. *Id.*

95. *Id.* (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 & n.6 (1985)).

96. *Id.* at 25 n.2 (quoting 9 U.S.C. § 1 (1988)).

97. *Id.* at 25.

98. *Id.* at 26.

99. *Id.* (first alteration in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

100. *Id.*

101. *Id.*

102. *Id.* at 29 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483 (1989)).

103. *Id.* at 30.

the arbitrator's decision.¹⁰⁴ Second, although the discovery allowed in arbitration is more limited than that permitted for a trial, this is a conscious choice by the parties, who choose the speed and simplicity of arbitration over litigation's more expansive discovery.¹⁰⁵ Third, the lack of an extensive opinion by the arbitrator is not fatal to the validity of arbitration as a valid alternative to litigation.¹⁰⁶ Finally, arbitration's nontraditional remedies provide another incentive for parties to choose arbitration over litigation.¹⁰⁷

Even though decisions such as *Gilmer* further the FAA's aims of encouraging arbitration, they ultimately reach conclusions at odds with the original intent of the drafters of the FAA, who never intended for the FAA to give preference to agreements to arbitrate.¹⁰⁸ Rather the drafters intended to create an adequate alternative to litigation.¹⁰⁹ In fact, at least one scholar has noted that the American Bar Association committee that drafted the precursor to the FAA only intended it to apply to "arbitration agreements between merchants who have equal bargaining power and . . . only [to] commercial contracts and disputes."¹¹⁰ Justice John Paul Stevens of the U.S. Supreme Court acknowledged such a position in his dissent in *Gilmer*, stating, "I doubt that any legislator who voted for [the FAA] expected it . . . to form contracts between parties of unequal bargaining power . . ."¹¹¹ Moreover, the drafters may have only intended the FAA to cover ordinary and simple disputes believing that major issues involving constitutional questions and policy should be resolved by the judiciary.¹¹²

Nevertheless, under the judiciary's current interpretation of the FAA, courts place arbitration agreements on "better footing than other contracts."¹¹³ Even though the U.S. Supreme Court has noted that the FAA "confers only the right to obtain an order directing that 'arbitration proceed in the manner provided for in [the parties'] agreement,'"¹¹⁴ federal courts have implemented an agenda favoring arbitration by interpreting arbitration provisions

104. See *supra* text accompanying note 27.

105. *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

106. *Id.* at 31-32.

107. *Id.*

108. Pittman, *supra* note 28, at 843-44.

109. *Id.*

110. *Id.* at 825 (emphasis omitted).

111. *Gilmer*, 500 U.S. at 42 (Stevens, J., dissenting).

112. Pittman, *supra* note 28, at 825-26 (quoting Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926)).

113. Baker, *supra* note 4, at 676.

114. *Volt Info. Scis. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75 (1989) (alteration in original) (emphasis omitted) (quoting 9 U.S.C. § 4 (1988)).

broadly.¹¹⁵ This agenda reveals itself in the U.S. Supreme Court's instructions to "rigorously enforce agreements to arbitrate."¹¹⁶ One scholar has posited that the judicial policy of favoring arbitration is, in actuality, a means "to further the Court's own self-interested goal of reducing the number of cases pending in the federal courts."¹¹⁷ While in the courts' interest, favoring arbitration may also be sound policy because the parties can apply many prearbitration expenses to subsequent litigation but cannot recover the cost and delays associated with litigation. There remains a risk, however, that a reviewing court will not overturn or review either the decision compelling arbitration or the final arbitration award.¹¹⁸

When evaluating this risk, the parties must remember that courts rarely overturn arbitration awards.¹¹⁹ Three main reasons explain the rarity. First, courts view arbitration as a low-cost, fast alternative to litigation, and frequently vacated arbitration awards would reduce arbitration to a costly preliminary step in litigation.¹²⁰ Second, and more importantly, courts view vacating the award as contrary to the parties' bargain.¹²¹ Third, the FAA allows the reviewing court to overturn or modify an award only under limited circumstances.¹²² These limited circumstances are justified because allowing the courts to frequently vacate arbitration awards would, in essence, allow the court not to enforce the contract between the parties, which is one of the problems the FAA sought to cure.¹²³

Based on the current judicial policy favoring arbitration, the forum selection possibilities, and the increase in electronic commerce, arbitration agreements will likely continue to grow in importance and use as will disputes over the scope and applicability of such agreements.¹²⁴ With this growth, parties will seek more certainty in how disputes will be resolved.

115. WARE, *supra* note 12, § 2.31, at 69.

116. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

117. Pittman, *supra* note 28, at 830.

118. Jones, *supra* note 62, at 376.

119. *Id.*

120. WARE, *supra* note 12, § 2.43, at 90.

121. *Id.* at 89.

122. The courts can review or modify the award only "[w]here the award was procured by corruption, fraud, or undue means"; where the arbitrators were not independent; where the arbitrators exceeded their powers or acted in a way to prejudice the proceedings; or where the award does not adequately resolve the dispute in question. 9 U.S.C. §§ 10-11 (2000 & Supp. IV 2004).

123. WARE, *supra* note 12, § 2.43, at 90.

124. F. PAUL BLAND, JR. ET AL., CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS 4 (4th ed. 2004).

Thus, the current judicial split could significantly alter how some businesses are conducted.

III. Circuit Court Split on Whether an Appeal Under § 16 Divests the District Court of Jurisdiction

Before the passage of § 16 of the FAA, the *Enelow-Ettelson* doctrine governed the appealability of a district court's decision to grant or deny a motion to stay legal proceedings pending arbitration.¹²⁵ Under this doctrine, "a stay of legal proceedings on equitable grounds was analogous to an injunction," and injunctions are immediately appealable under 28 U.S.C. § 1292(a)(1).¹²⁶ "[B]ecause arbitration was an equitable defense," decisions about whether to stay the district court's proceedings "pending arbitration was appealable as an injunction."¹²⁷ The U.S. Supreme Court eventually overruled the *Enelow-Ettelson* doctrine in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*¹²⁸

Congress enacted § 16 of the FAA to fill the void left by the overruled *Enelow-Ettelson* doctrine,¹²⁹ and § 16 continues to govern the appealability of decisions regarding arbitration. As previously discussed, § 16 allows for the immediate appeal of antiarbitration decisions, while orders compelling arbitration are only appealable in accordance with 28 U.S.C. §§ 1291 and 1292.¹³⁰ The FAA is silent, however, on whether the court in question should grant a motion to stay proceedings pending the immediate appeal of an antiarbitration decision,¹³¹ and the circuit courts are split on whether such an appeal divests the district court of jurisdiction, thus requiring a stay of the district court proceedings.¹³² Currently, the Second and Ninth Circuits hold that the district court is not divested of jurisdiction, and thus, a stay is not required.¹³³ Conversely, the Seventh, Tenth, and Eleventh Circuit hold that the district court is divested of jurisdiction unless the appeal is frivolous.¹³⁴

125. *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 505 (7th Cir. 1997); *Jones*, *supra* note 62, at 365-66.

126. *Jones*, *supra* note 62, at 366.

127. *Id.*

128. 485 U.S. 271 (1988).

129. *Bradford-Scott Data Corp.*, 128 F.3d at 505.

130. 9 U.S.C. § 16 (2000); *see also Bradford-Scott Data Corp.*, 128 F.3d at 505.

131. *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1160 (10th Cir. 2005).

132. *McCauley*, 413 F.3d at 1160.

133. *Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2d Cir. 2004); *Britton v. Co-op Banking Group*, 916 F.2d 1405 (9th Cir. 1990).

134. *McCauley*, 413 F.3d 1158; *Blinco v. Green Tree Servicing, L.L.C.*, 366 F.3d 1249 (11th Cir. 2004) (*per curiam*); *Bradford-Scott Data Corp.*, 128 F.3d 504.

A. Circuit Court Cases Holding that the District Court Is Not Divested of Jurisdiction

In *Britton v. Co-op Banking Group*,¹³⁵ the U.S. Court of Appeals for the Ninth Circuit became one of the first appellate courts to address whether an interlocutory appeal under § 16 of the FAA divests the district court of jurisdiction.¹³⁶ This opinion has become the foremost opinion asserting that a § 16 interlocutory appeal does not divest the district court of jurisdiction, as evidenced by the U.S. Court of Appeals for the Second Circuit express adoption of the Ninth Circuit's reasoning in reaching the same result.¹³⁷

1. Britton v. Co-op Banking Group

In *Britton*, the plaintiffs alleged that the defendant had engaged in securities fraud by selling a fraudulent tax shelter investment and filed a claim in the district court.¹³⁸ The defendant's sole response was to assert his Fifth Amendment privilege against self-incrimination.¹³⁹ When the plaintiffs refused to settle, the defendant demanded arbitration of the dispute based on an arbitration provision contained in the original contract of sale.¹⁴⁰ The defendant made this demand more than a year after the filing of the original complaint.¹⁴¹ Accordingly, the defendant filed a motion to compel arbitration pursuant to § 4 of the FAA.¹⁴² The district court denied the motion to compel arbitration, and the defendant appealed the district court's decision.¹⁴³ On interlocutory appeal, a panel of the Ninth Circuit denied a motion to stay the district court proceedings pending the appeal of the denial of the motion to compel arbitration, and the district court entered a default judgment against the defendant for failure to comply with the district court proceedings.¹⁴⁴

In reaching its decision, the Ninth Circuit concluded that a district court's judgment on the merits did not preclude the circuit court from hearing the appeal of the denial of the motion to compel arbitration because the circuit court could vacate the district court's decision upon determining that the

135. 916 F.2d 1405.

136. *See id.*

137. *See discussion infra* Part III.A.2.

138. *Britton*, 916 F.2d at 1407.

139. *Id.*

140. *Id.* at 1407-08.

141. *Id.* at 1407.

142. *Id.* at 1408.

143. *Id.*

144. *Id.* at 1408-09 (reviewing the procedural history of the unreported district court ruling).

district court should have granted the motion to compel arbitration.¹⁴⁵ Without the power to vacate the district court's judgment "the statutory right to appeal would be nugatory."¹⁴⁶ Moreover, the Ninth Circuit reasoned that the fear of contempt sanctions and the possibility of the circuit court sustaining the judgment of the district court would induce the parties to comply with a district court's orders and judgments.¹⁴⁷ The court equated this scenario to the risk assessment undertaken by a defendant who challenges personal jurisdiction by refusing to appear.¹⁴⁸ If a defendant refuses to appear, the defendant becomes subject to a default judgment.¹⁴⁹ To enforce this judgment, the plaintiff must bring the default judgement to a forum with personal jurisdiction over the defendant.¹⁵⁰ If the new forum rules that the original court had personal jurisdiction, the defendant is subject to the judgment with no opportunity to contest the case on the merits.¹⁵¹

Once the court determined that the appeal was not moot, the court addressed the issue of whether the appeal pursuant to § 16 of the FAA divested the district court of jurisdiction over the case.¹⁵² Acknowledging the general rule that a notice of appeal divests the district court of jurisdiction and vests jurisdiction in the appellate court, the Ninth Circuit determined that appeals from a denial to compel arbitration were an exception to this general rule.¹⁵³ The Ninth Circuit ruled that arbitrability was separate from the merits of the case and that the district court, by not staying its proceedings, was "simply moving the case along consistent with its view of the case as reflected in its order denying arbitration."¹⁵⁴ In other words, the appeal did not divest the district court of jurisdiction because "an appeal of an interlocutory order does not ordinarily deprive the district court of jurisdiction except with regard to matters that are the subject of the appeal," and the only substantive issue raised by a § 16 appeal is that of arbitrability.¹⁵⁵

The court feared that a contrary ruling — requiring a mandatory stay — would allow a defendant to stall the trial court's proceedings by bringing a frivolous motion to compel arbitration.¹⁵⁶ The court reasoned that the FAA

145. *Id.* at 1410.

146. *Id.*

147. *Id.* at 1411.

148. *Id.*

149. *Id.*

150. *See id.*

151. *See id.*

152. *Id.*

153. *Id.* at 1411-12.

154. *Id.* at 1412.

155. *Id.*

156. *Id.*

provided adequate protection for the party seeking arbitration by granting the district court the authority to evaluate whether the circumstances warranted a stay.¹⁵⁷

Even though the Ninth Circuit evaluated the appeal in light of the FAA, the FAA does not fully support the Ninth Circuit's reasoning. The court relied on the language of § 3 that states, "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, [the court] shall on application of one of the parties stay the trial."¹⁵⁸ The Ninth Circuit, however, misapplied § 3 of the FAA. Section 3 applies only when the district court determines that the issue "is referable to arbitration" and grants the motion to compel arbitration under § 4.¹⁵⁹ Thus, § 3 did not apply in *Britton* because the district court had not compelled arbitration under § 4.

Furthermore, the Ninth Circuit failed to address two issues in its opinion. First, the court did not answer why a district court would stay its proceedings pending an appeal that the court believes is without merit. Second, the court failed to address the section of the FAA that did apply, § 16. As previously noted, § 16 is silent on whether the district court should grant a stay during an appeal of a denial to compel arbitration.¹⁶⁰ In addition, the Ninth Circuit blindly relied on two cases in which courts used their discretion to grant stays in the proceedings: *Pearce v. E.F. Hutton Group, Inc.*¹⁶¹ and *C.B.S. Employees Federal Credit Union v. Donaldson, Lufkin & Jenrette Securities Corp.*¹⁶²

In *Pearce*, the U.S. Court of Appeals for the District of Columbia addressed two main issues: whether the claim brought by the plaintiff was subject to the arbitration agreement and whether the court should stay the district court proceedings pending arbitration.¹⁶³ The Hutton Group "pled guilty to 2,000 counts of mail and wire fraud in connection with its cash management practices."¹⁶⁴ In the aftermath of these guilty pleas, the Hutton Group employed an independent investigator to determine who, internally, was responsible for the fraud.¹⁶⁵ A subsequent press release named the plaintiff as one of a select few individuals responsible for the fraud,¹⁶⁶ and the plaintiff

157. *Id.*

158. 9 U.S.C. § 3 (2000).

159. *Id.*

160. *See supra* text accompanying note 9.

161. 828 F.2d 826 (D.C. Cir. 1987).

162. 716 F. Supp. 307 (W.D. Tenn. 1989).

163. *Pearce*, 828 F.2d at 829.

164. *Id.* at 827.

165. *Id.*

166. *Id.*

sued the Hutton Group and the independent investigator claiming that the press release defamed him.¹⁶⁷ The Hutton Group moved to stay all proceedings and to subject all claims to arbitration in accordance with the rules of the New York Stock Exchange, with which the plaintiff had to register as a condition of employment with the Hutton Group.¹⁶⁸

The district court denied the motion to compel arbitration, finding that the dispute fell outside of the arbitration agreement.¹⁶⁹ Moreover, the district court found that the claim against the independent investigator was not subject to arbitration as the investigator was not bound by the arbitration provisions found in the rules of the New York Stock Exchange.¹⁷⁰ Therefore, if the court compelled arbitration of the claims against the Hutton Group, the court would have to stay the proceedings against the independent investigator pending the arbitration.¹⁷¹ The district court reasoned that this bifurcation would afford the independent investigator “an unfair advantage in the eventual trial before the court between [the independent investigator] and [the] plaintiff.”¹⁷² The district court, however, did stay the proceeding against the Hutton Group pending an appeal of the arbitrability of the claim against it.¹⁷³ The district court noted that the “Hutton Group would suffer *substantial harm* if [the plaintiff’s] action were not stayed pending appeal and the District Court was later reversed.”¹⁷⁴

Upon appeal by the Hutton Group, the D.C. Circuit acknowledged that a strong federal policy encouraged interpreting disputes in such a way as to fall within arbitration agreements.¹⁷⁵ When the arbitration is specifically tailored for such a dispute and the arbitration will be conducted by experts in the field, the policy in favor of arbitration is at its strongest.¹⁷⁶ The court also noted that once a court determines that a dispute is subject to arbitration, the court must stay the district court proceedings in accordance with § 3 of the FAA.¹⁷⁷ With these principles in mind, the circuit court held that the claim against the Hutton Group was subject to arbitration, and § 3 of the FAA mandated that the circuit court stay the district court’s proceedings.¹⁷⁸

167. *Id.*

168. *Id.* at 828.

169. *Id.*

170. *Id.*

171. *Id.* at 828-29.

172. *Id.* at 828 (internal quotation marks omitted).

173. *Id.* at 829.

174. *Id.* (emphasis added).

175. *Id.*

176. *Id.*

177. *Id.* at 830.

178. *Id.* at 833.

The circuit court also noted that the claim against the independent investigator could proceed even though the claim against the Hutton Group was subject to arbitration.¹⁷⁹ The court stated that it was “immaterial that arbitration of that action will likely involve an examination of [the independent investigator’s] conduct.”¹⁸⁰ In addition, the court stated that it was immaterial to its decision whether the litigation against the independent investigator ended before or after the arbitration against the Hutton Group.¹⁸¹ The circuit court, however, did not address whether the district court’s actual grant and denial of stays was appropriate for the claims against the Hutton Group and the independent investigator, respectively.

Thus, the Ninth Circuit failed to recognize key differences between *Pearce* and *Britton*. First, the district court in *Pearce* granted a stay pending the appeal of claims that the district court thought may be subject to arbitration.¹⁸² The D.C. Circuit’s failure to address whether granting a stay was appropriate can be seen as an implicit ruling that the action was appropriate. The D.C. Circuit’s acknowledgment that the claims against the independent investigator should proceed regardless of the pending arbitration against the Hutton Group strengthens this position. Thus, the holding of *Pearce*, at least implicitly, opposes the Ninth Circuit’s ultimate holding in *Britton* that the district court should not stay its proceedings pending appeal. The Ninth Circuit determined that *Pearce* was an example of a district court exercising discretion in choosing whether to grant a stay.¹⁸³ The district court in *Pearce*, however, was more likely exercising its discretion in determining whether the claim could potentially be subject to arbitration when analyzed under the judiciary’s policy of interpreting arbitration agreements broadly. Furthermore, if the claim could be subject to arbitration, a stay must be granted following § 3 of the FAA in order to prevent the litigant from incurring substantial harm. Therefore, the D.C. Circuit in *Pearce* did not address the level of discretion a court has in determining whether the proceedings should be stayed, but this is the very proposition for which the Ninth Circuit in *Britton* cites *Pearce*.

The Ninth Circuit also relied on *C.B.S. Employees Federal Credit Union v. Donaldson, Lufkin & Jenrette Securities Corp.* in *Britton*.¹⁸⁴ In *C.B.S.*, the

179. *Id.* at 833 n.4.

180. *Id.* This is just another example of how the courts are willing to authorize piecemeal resolutions in order to effectuate an arbitration agreement.

181. *Id.*

182. *Id.* at 829.

183. *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990).

184. *Id.* (citing *C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 716 F. Supp. 307 (W.D. Tenn. 1989)).

district court reasoned that even though § 16¹⁸⁵ effectively answers the question of whether orders denying stays pending arbitration are appealable, “it does not address a party’s right to have the proceedings stayed pending such appeal.”¹⁸⁶ The district court applied the four-prong test developed by the U.S. Supreme Court in *Hilton v. Braunskill*¹⁸⁷ to evaluate whether it should grant a stay under the Federal Rules of Civil Procedure.¹⁸⁸ The four-part test analyzes:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) [whether] public interest [favors a stay].¹⁸⁹

The district court in *C.B.S.* determined that a showing that a “serious legal question” existed triggered an analysis of the first prong.¹⁹⁰ To satisfy this element, the litigant need not show that success on appeal is likely because such a showing would require the district court to admit “that it erred in not granting [the litigant’s] original motion to stay the proceedings.”¹⁹¹ Instead, the litigant need only show that a difference of opinion exists between the court and the litigant over an important legal question.¹⁹² Furthermore, the court stated that the second element was satisfied even though monetary expenses are usually not considered irreparable harm because the point of the appeal is to avoid the cost of litigation, and without the stay the appeal is meaningless.¹⁹³ This rationale is similar to one advanced by the drafters of the FAA — “the party willing to perform his contract for arbitration is not subject to the delay and cost of litigation.”¹⁹⁴ The district court, in analyzing the third prong, determined that a stay would not substantially injure the other parties

185. When the *C.B.S.* opinion was written, § 16 was numbered as § 15. See *C.B.S.*, 716 F. Supp. at 309. The renumbering to § 16 did not occur until 1990. See *supra* note 59.

186. *C.B.S.*, 716 F. Supp. at 309.

187. 481 U.S. 770 (1986).

188. *C.B.S.*, 716 F. Supp. at 309.

189. *Id.* (alterations in original) (quoting *Hilton*, 481 U.S. at 776). See generally John Y. Gotanda, *The Emerging Standards for Issuing Appellate Stays*, 45 BAYLOR L. REV. 809 (1993) (discussing the different approaches courts have taken when applying these criteria).

190. *C.B.S.*, 716 F. Supp. at 310 (quoting *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)).

191. *Id.* at 309.

192. *Id.* at 310 (quoting *Wash. Metro. Area Transit Comm’n*, 559 F.2d at 843).

193. *Id.*

194. H.R. REP. NO. 68-96, at 2 (1924).

because delay is not considered a substantial injury.¹⁹⁵ Finally, the district court found that the public policy favoring “efficient allocation of judicial resources” fulfilled the fourth prong.¹⁹⁶

Applying this analysis to the facts of *Britton* indicates that the Ninth Circuit should have granted a stay. First, the question of arbitrability was a significant legal issue affecting the district courts authority to hear the case. Second, the benefit of the appeal would be lost if defendant paid the litigation expenses. Third, no evidence existed that an increased delay was not the only injury faced by the plaintiffs, and finally, granting the stay would conserve judicial resources. In fact, by not complying with the district court’s orders, the defendant in *Britton* seemed to obtain the most efficient outcome by conserving his resources and the resources of the court.

2. *Weiner v. Gutfreund (In re Salomon Inc. Shareholders’ Derivative Litigation)* and *Motorola Credit Corp. v. Uzan*

Five years after the Ninth Circuit’s decision of *Britton*, the U.S. Court of Appeals for the Second Circuit first addressed whether the district court should stay its proceedings pending an interlocutory appeal under § 16 of the FAA in *Weiner v. Gutfreund (In re Salomon Inc. Shareholders’ Derivative Litigation)*¹⁹⁷ and affirmed its decision nine years later in *Motorola Credit Corp. v. Uzan*.¹⁹⁸ *In re Salomon* involved a shareholder derivative suit brought by Salomon Brothers against several former employees.¹⁹⁹ The employees moved to compel arbitration under § 4 of the FAA based on an arbitration provision in their employment contracts and moved to stay the “three-year old derivative suit.”²⁰⁰ The arbitrator named in the agreement refused to arbitrate the dispute, and the district judge ordered that the parties proceed to trial because he found that the agreement to arbitrate had been fulfilled and that the employees were only using arbitration to “put[] off the awful day” of trial.²⁰¹ Furthermore, the district judge denied the employees’ motion to stay the trial pending an appeal under § 16 of the FAA.²⁰² The Second Circuit twice denied a similar motion by the employees,²⁰³ concluding that it would “not disturb

195. *C.B.S.*, 716 F. Supp. at 310.

196. *Id.*

197. 68 F.3d 554 (2d Cir. 1995).

198. 388 F.3d 39 (2d Cir. 2004).

199. *In re Salomon*, 68 F.3d at 556.

200. *Id.*

201. *Id.* at 557.

202. *Id.*

203. *Id.*

[the district judge]'s decision to proceed to trial."²⁰⁴ The Second Circuit clarified its rationale in *In re Salomon* with its decision in *Motorola*.

In *Motorola*, the court explicitly followed its precedent of *In re Salomon* and adopted the Ninth Circuit's position that the question of arbitrability is separate from the merits of the dispute.²⁰⁵ The Second Circuit in *Motorola* stated that the *In re Salomon* decision "plainly contemplated that a district court has jurisdiction to proceed with a case despite the pendency of an appeal from an order denying a motion to compel arbitration."²⁰⁶ Potentially even more relevant than the precedent of *In re Salomon* were the Second Circuit's factual findings in *Motorola*. The court found that the appellants had "swindled two large corporations out of well over \$2 billion,"²⁰⁷ had falsely accused the appellees of making threats to kill the appellants, and had brought the appeal to compel arbitration and to stay the district court proceedings only after the district court's ultimate decision against them.²⁰⁸ Additionally, the defendants not only sought to compel arbitration but to undo a completed trial.²⁰⁹

The decision in *Motorola* simultaneously expanded and restricted a district judge's ability to proceed to trial pending an appeal of arbitrability. The decision expanded the district judge's ability to proceed to trial by effectively eliminating any inquiry into the frivolousness of the appeal, stating that even though the "appeal was not frivolous, the District Court did have jurisdiction to continue with the case."²¹⁰ The Second Circuit added a caveat, however, that the district court is forced to stay its proceedings if ordered by the circuit court.²¹¹ This language removes some of the discretion granted to district judges in *In re Salomon* by demonstrating the circuit court's willingness to interfere with the lower court's proceedings.

The U.S. Courts of Appeals for the Ninth and Second Circuits have been the two main advocates of the position that a court should not stay the district court's proceedings because arbitrability is separate from the merits of a case. This opinion, however, is only one side of the issue.

204. *Id.* at 561.

205. *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 54 (2d Cir. 2004).

206. *Id.*

207. *Id.* at 42.

208. *Id.* at 44.

209. *Id.* at 54.

210. *Id.* at 53.

211. *Id.* at 54.

B. Circuit Court Cases Holding that the District Court Is Divested of Jurisdiction

As noted, the Ninth Circuit's opinion in *Britton* has become the seminal opinion supporting the contention that a § 16 interlocutory appeal does not divest the district court of jurisdiction. The U.S. Court of Appeals for Seventh Circuit's opinion in *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*²¹² provides an antithesis to the *Britton* opinion. At least two additional circuits — the Tenth Circuit in *McCauley v. Halliburton Energy Services, Inc.*²¹³ and the Eleventh Circuit in *Blinco v. Green Tree Servicing, L.L.C.*²¹⁴ — have used the *Bradford-Scott Data Corp.* opinion as part of their rationale for staying the district court proceedings.²¹⁵

1. Bradford-Scott Data Corp. v. Physician Computer Network, Inc.

In *Bradford-Scott Data Corp.*,²¹⁶ the U.S. Court of Appeals for the Seventh Circuit issued the most influential opinion in favor of staying the district court proceedings pending the appeal of a denial to compel arbitration. Bradford-Scott Data Corporation (Bradford-Scott) had entered into an arrangement to sell computer software written by VERSYSS, Inc. (VERSYSS).²¹⁷ Two separate agreements made up the arrangement: the Vertical Value-Added Reseller Agreement (VAR) and the Master License Agreement (MLA).²¹⁸ Each agreement contained an arbitration clause, with the clause in the VAR being substantially broader than that in the MLA.²¹⁹ Physician Computer Network (PCN) subsequently acquired VERSYSS.²²⁰ Bradford-Scott commenced the litigation, asserting that VERSYSS breached the MLA through the PCN acquisition and subsequent conduct.²²¹ Specifically, PCN offered a competing software package to the package Bradford-Scott licensed from VERSYSS.²²² VERSYSS and PCN moved, pursuant to § 4 of the FAA, to compel arbitration.²²³ The district court found that Bradford-Scott was not required to arbitrate the dispute because the arbitration clause in the MLA did

212. 128 F.3d 504 (7th Cir. 1997).

213. 413 F.3d 1158 (10th Cir. 2005).

214. 366 F.3d 1249 (11th Cir. 2004) (per curiam).

215. See *McCauley*, 413 F.3d at 1161-62; *Blinco*, 366 F.3d at 1251-52.

216. 128 F.3d 504.

217. *Id.* at 504.

218. *Id.*

219. *Id.* at 505.

220. *Id.* at 504.

221. *Id.*

222. *Id.*

223. *Id.* at 505.

not cover the particular dispute.²²⁴ Rather, the arbitration clause only covered disputes concerning payments of license and support fees.²²⁵ Additionally, the district court refused to stay proceedings pending VERSYSS's and PCN's appeals under § 16 of the FAA.²²⁶

On interlocutory appeal, the Seventh Circuit began its analysis by stating that “[t]o obtain a stay of a district court’s judgment, the appellant must establish irreparable harm and a significant probability of success on the merits, against a background norm that appellate courts are reluctant to disturb decisions in advance of full review.”²²⁷ These two factors — irreparable harm and significant probability of success on the merits — resemble the first two factors enumerated by the U.S. Supreme Court in *Hilton v. Braunkill*²²⁸ and applied in *C.B.S. Employees Federal Credit Union v. Donaldson, Lufkin & Jenrette Securities Corp.*²²⁹ The *Bradford-Scott Data Corp.* court held that based on this standard the appellants failed to meet their burden because costs of litigation do not constitute irreparable harm.²³⁰ This conflicts with the Western District of Tennessee’s holding in *C.B.S.*, and with the beliefs of the FAA drafters, that the cost of litigation is irreparable harm because it denies the litigant the benefit of the bargain, i.e., not having to litigate a dispute.²³¹

The Seventh Circuit’s analysis acknowledged that filing an appeal is not sufficient to stay a lower court’s proceedings.²³² Rather, a party may secure a stay from the district court or from the appellate court, if the district court denies the stay.²³³ Both district courts and appellate courts have applied the four-prong test developed in *Hilton*, or some variant of it, to determine whether to grant a stay.²³⁴ Because the Seventh Circuit’s previous analysis dictated that the costs of litigation are not considered irreparable harm and a stay should not be granted,²³⁵ the court changed the question from “whether

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. 481 U.S. 770, 776 (1987).

229. 716 F. Supp. 307, 309 (W.D. Tenn. 1989).

230. *Bradford-Scott Data Corp.*, 128 F.3d at 505.

231. *See supra* text accompanying notes 193-94.

232. James R. Foley, Recent Developments, *Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc.*, 13 OHIO ST. J. ON DISP. RESOL. 1071, 1075 (1998).

233. *Id.*

234. *Id.*

235. *See Bradford-Scott Data Corp.*, 128 F.3d at 505; Foley, *supra* note 232, at 1076. *But see* Gabriel Taran, Comment, *Towards a Sensible Rule Governing Stays Pending Appeals of Denials of Arbitration*, 73 U. CHI. L. REV. 399, 411-12 (2006) (arguing that this precedent should be overruled and that the circuit courts should adopt a standard of discretion regarding stays pending arbitration).

appellants have shown a powerful reason why the district court must halt proceedings” to “whether there is any good reason why the district court may carry on once an appeal has been filed.”²³⁶

The Seventh Circuit may not have had to resort to these judicial gymnastics in order to grant the stay. In *Graphic Communications Union v. Chicago Tribune Co.*,²³⁷ the Seventh Circuit held that no cost, including both out-of-pocket and opportunity costs, associated with arbitration sufficiently qualifies as irreparable harm in order to mandate that the appellate court grant a stay.²³⁸ The court reasoned that a contrary ruling would unduly facilitate the staying of arbitration orders,²³⁹ thus losing the primary benefit of arbitration — the swift resolution of disputes.²⁴⁰ This decision is also consistent with the underlying policy of the FAA to enforce arbitration agreements as well as the U.S. Supreme Court’s policy of favoring arbitration. The court reasoned that the only harm to the party being compelled to arbitrate was having to contest the dispute in a forum not of his choosing.²⁴¹ As the court indicates, however, this is no different than a denial of a summary judgment motion.²⁴²

The procedural posture of *Graphic Communications Union*, however, is notably different than that found in *Bradford-Scott Data Corp.* The most important difference is that *Graphic Communications Union* involved a district court decision *compelling* arbitration,²⁴³ while *Bradford-Scott Data Corp.* involved a district court decision *denying* a motion to compel arbitration.²⁴⁴ As the district court in the Western District of Tennessee stated, a court’s denial of a motion to stay the district court proceedings pending an appeal from a denial to compel arbitration might pose irreparable harm because the party seeking arbitration is being forced to litigate the dispute — the exact reason for the appeal — and is being denied the benefit of the bargain.²⁴⁵ While the expense and delay of litigation eliminate the benefits of arbitration, the parties still benefit at trial from the discovery and preparation done for arbitration.²⁴⁶ Furthermore, the policy behind the FAA is to encourage, if not

236. *Bradford-Scott Data Corp.*, 128 F.3d at 505.

237. 779 F.2d 13 (7th Cir. 1985).

238. *Id.* at 15.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 14-15.

244. *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 505 (7th Cir. 1997).

245. *C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 716 F. Supp. 307, 310 (W.D. Tenn. 1989).

246. *Jones*, *supra* note 62, at 375-76.

require, the courts to enforce contracts, specifically arbitration agreements.²⁴⁷ Moreover, the Supreme Court has shown its willingness to place arbitration agreements above all other contracts.²⁴⁸ Considering both the procedural posture of the appellant in *Bradford-Scott Data Corp.* and the policy of enforcing contracts, even though a person seeking to avoid arbitration cannot show irreparable harm, a person seeking to compel arbitration probably can.

In the end, the Seventh Circuit in *Bradford-Scott Data Corp.* implicitly acknowledged the different results based on the posture of the individual seeking the stay of the district court proceedings by changing the inquiry from why the district court should be stayed to why the district should continue.²⁴⁹ In fact, the Seventh Circuit discussed how “[a]rbitration clauses reflect the parties’ preference for non-judicial dispute resolution, which may be faster and cheaper,” and how these benefits may be lost or reduced if the parties must “proceed in both judicial and arbitral forums.”²⁵⁰ Accordingly, the court concluded that “[c]ases of this kind are therefore poor candidates for exceptions” to the general rule that notice of an appeal divests the district court of jurisdiction.²⁵¹

Even so, the Seventh Circuit’s primary argument for granting a stay pending an appeal is that the arbitrability of the dispute is not inseparable from the merits of the case.²⁵² The court began its analysis in *Bradford-Scott Data Corp.* by stating the general proposition that a district court and the court of appeals should not exercise jurisdiction over the same case simultaneously.²⁵³ This proposition, the court contended, was fundamental to a hierarchical judiciary.²⁵⁴ Moreover, the issue of arbitrability is inseparable from the merits of the case because continuation of the district court’s proceedings “largely defeats” the purpose of the appeal and “creates a risk of inconsistent” verdicts.²⁵⁵ Thus, arbitrability permeates the very essence of the dispute, which is whether the district court has the authority to hear the dispute.²⁵⁶

Furthermore, the Seventh Circuit analogized an appeal of arbitrability to appeals asserting a double jeopardy defense, an Eleventh Amendment immunity defense, and a qualified immunity defense.²⁵⁷ Because the issue on

247. See *supra* text accompanying notes 46-47.

248. See *supra* Part II.C.

249. See *Bradford-Scott Data Corp., Inc.*, 128 F.3d at 505.

250. *Id.* at 506.

251. *Id.*

252. Foley, *supra* note 232, at 1080.

253. *Bradford-Scott Data Corp.*, 128 F.3d at 505.

254. *Id.*

255. *Id.*

256. See Foley, *supra* note 232, at 1080-81.

257. *Bradford-Scott Data Corp.*, 128 F.3d at 506.

appeal in each scenario is whether the district court has the authority to hear the case, the court stated that the district court's proceedings are stayed unless the district court or the court of appeals determines that the appeal is frivolous.²⁵⁸

Under this reasoning, the Seventh Circuit effectively created an automatic stay of the district court's proceedings when a litigant appeals a decision adverse to arbitration. The Seventh Circuit stated that the ability of the district court or the court of appeals to determine whether the appeal is frivolous sufficiently guards against an "obstinate or crafty litigant" disrupting the district court's proceedings.²⁵⁹ The court, however, failed to realize that these two positions — quasi-automatic stay and the ability to determine whether the appeal is frivolous — are at odds. The Seventh Circuit's assertion that arbitrability is inseparable from the merits leaves no room for the district court to exercise its discretion in determining that the appeal is frivolous. Thus, a stay is mandatory.²⁶⁰ Furthermore, short of determining the issue of arbitrability, the court of appeals has no discretion to determine that an appeal is frivolous and deny a stay.

Nevertheless, the Seventh Circuit laid out the seminal opinion on why the district court or the court of appeals should grant a stay of the district court's proceedings pending an appeal from a denial of a motion to compel arbitration. Effectively, the Seventh Circuit's reasoning rests on the proposition that arbitrability is inseparable from the merits of the case because arbitrability determines the extent of the district court's jurisdiction.

2. *Blinco v. Green Tree Servicing, L.L.C.*

In *Blinco v. Green Tree Servicing, L.L.C.*, the U.S. Court of Appeals for the Eleventh Circuit analyzed the effect that an appeal under § 16 has on the district court's proceedings.²⁶¹ The plaintiffs in *Blinco* alleged that the defendant violated the Real Estate Settlement Procedures Act (RESPA) by failing to notify the plaintiffs that the defendant was transferring the servicing of the plaintiffs' loan.²⁶² The defendant contended that the arbitration provision contained in the promissory note executed by the plaintiffs controlled the issue and moved to stay the district court's proceedings and compel arbitration under the FAA.²⁶³ The arbitration provision stated that "[a]ll disputes . . . arising from or relating to this contract or the relationships

258. *See id.*

259. *Id.*

260. *See* Foley, *supra* note 232, at 1079.

261. *Blinco v. Green Tree Servicing, L.L.C.*, 366 F.3d 1249 (11th Cir. 2004) (per curiam).

262. *Id.* at 1250.

263. *Id.*

which result from this contract . . . shall be resolved by binding arbitration.”²⁶⁴ Moreover, the contract provision also stated that the parties acknowledged selecting arbitration rather than litigation.²⁶⁵ The district court denied both the motion to compel arbitration and the motion to stay proceedings made by the defendant.²⁶⁶ When the defendant appealed the denial under § 16(a)(1)(A), the district court again denied the defendant’s motion to stay the proceedings because the court did not want to set the precedent that interlocutory appeals stayed proceedings,²⁶⁷ and “a stay was unnecessary because the issue of arbitrability would be decided on appeal before trial.”²⁶⁸

To reach its decision, the Eleventh Circuit followed the reasoning of the Seventh Circuit in *Bradford-Scott Data Corp.* and held that “upon the filing of a non-frivolous appeal under 9 U.S.C. § 16(a), the district court should not exercise control over the aspects of the case involved in the appeal.”²⁶⁹ Moreover, “[u]pon motion, proceedings in the district court . . . should be stayed pending resolution of a non-frivolous appeal from the denial of a motion to compel arbitration.”²⁷⁰ The Eleventh Circuit was more explicit than the Seventh Circuit, however, in stating that the cost of simultaneously pursuing both litigation and arbitration mandates staying the district court’s proceedings. The Eleventh Circuit reasoned that Congress’s willingness to provide immediate judicial review to parties seeking arbitration signified Congress’s understanding that “one of the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost” without granting a stay of the district court’s proceedings.²⁷¹ In the court’s view, allowing an immediate appeal without granting a stay of the lower court’s proceedings is inconsistent with the policy behind an immediate appeal.²⁷² The court also stated that an arbitration provision gave a party the right “not to litigate the dispute in court and bear the associated burdens,” further indicating that the court should grant a stay.²⁷³ “If the court of appeals reverses” a denial of a motion to compel arbitration, “the costs of . . . litigation in the district court incurred during appellate review have been wasted and the parties must begin again in arbitration.”²⁷⁴

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 1251.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 1252.

273. *Id.*

274. *Id.* at 1251.

Similar to the Seventh Circuit, the Eleventh Circuit failed to recognize the inconsistency in its holding. Even though the Eleventh Circuit stated that “a stay need not be granted at the outset if the appeal is frivolous,”²⁷⁵ the court failed to mention how to determine whether an appeal is frivolous without making a ruling that is inconsistent with the policy rationales for granting an immediate appeal. The reasoning of the court leads to the conclusion that a stay is mandatory because the court views the cost of litigation as irreparable harm to the party wishing to arbitrate. Such a conclusion leaves no room for the district court to determine if the appeal is frivolous. Furthermore, the court of appeals can only determine that the appeal is frivolous by ruling on the arbitrability of the dispute. The court attempted to mitigate this result, however, by providing a procedural overview if a stay is merely permissive rather than mandatory,²⁷⁶ but this analysis is inapplicable because the stay is, in fact, mandatory under the court’s rationale.

In addition, the Eleventh Circuit failed to directly address the district court’s second reason for denying the stay: “that a stay was unnecessary because the issue of arbitrability would be decided on appeal before trial.”²⁷⁷ Under the Eleventh Circuit’s procedural guidelines, the district court can rule that a stay is frivolous and proceed toward trial pending the appeal of the motion to stay.²⁷⁸ At the very least, the denial of a motion to stay because the court of appeals would hear the appeal on arbitrability before the district court’s trial commenced implies that the stay is frivolous. The Eleventh Circuit fails, however, to show how the substance of this implicit ruling is inconsistent with the Eleventh Circuit’s procedural guidelines that allow for a stay to be denied in the case of a frivolous appeal.

Thus, under the Eleventh Circuit’s reasoning, a stay is mandatory. Nevertheless, the Eleventh Circuit provides inadequate guidelines for when and how a court can determine whether an appeal is frivolous.

3. *McCauley v. Halliburton Energy Services, Inc.*

The U.S. Court of Appeals for the Tenth Circuit addressed the issue of whether an appeal under § 16 of the FAA stays the district court’s proceedings in *McCauley v. Halliburton Energy Services, Inc.*²⁷⁹ The plaintiff and defendant in *McCauley* had an agreement to arbitrate all claims that fell within the defendant employer’s dispute resolution program.²⁸⁰ While working for

275. *Id.* at 1252.

276. *Id.* at 1253.

277. *Id.* at 1251.

278. *Id.* at 1253.

279. 413 F.3d 1158 (10th Cir. 2005).

280. *Id.* at 1159.

the defendant, the plaintiff sustained injuries, and the defendant terminated the plaintiff's employment subsequent to the injury.²⁸¹ The plaintiff filed suit against the defendant, asserting claims of negligence, fraud and deceit, intentional infliction of emotional distress, and wrongful termination.²⁸² Additionally, various members of the plaintiff's family brought claims against the defendant for loss of consortium.²⁸³

Upon the commencement of litigation, the defendant moved to compel arbitration pursuant to the dispute resolution program.²⁸⁴ The district court granted the defendant's motion to compel arbitration for all claims except those relating to negligence and loss of consortium.²⁸⁵ The court felt that these claims were outside of the arbitration agreement.²⁸⁶ The defendant filed an appeal in accordance with § 16 of the FAA to contest "the partial denial of its motion to compel arbitration," and the plaintiff moved for the district court to stay its proceedings pending the appeal.²⁸⁷ The district court denied the plaintiff's motion to stay.²⁸⁸ Subsequently, the defendant moved to stay the district court's proceedings pending the appeal, but the district court denied this motion to stay the proceedings as well and ordered the parties to proceed to litigate the negligence and consortium claims.²⁸⁹ The defendant appealed to the Tenth Circuit to stay all further litigation in the district court pending the appeal on the arbitrability of the negligence and loss of consortium claims.²⁹⁰

On appeal, the defendant advanced two arguments in support of its position.²⁹¹ First, the defendant argued that notice of appeal automatically divested the district court of jurisdiction.²⁹² Second, the defendant asserted, in the alternative, that the traditional four-factor test found in *Hilton* warranted a stay.²⁹³ The Tenth Circuit acknowledged that even though the U.S. Supreme Court had stated that "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously," there was no definitive guidance on whether the district court or court of appeals should grant a motion to stay the district court's proceedings during an interlocutory

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 1160.

291. *Id.*

292. *Id.*

293. *Id.*

appeal under § 16 of the FAA.²⁹⁴ Noting this void, the court addressed the current circuit split over this issue.²⁹⁵

The Tenth Circuit characterized the Second and Ninth Circuits as “refus[ing] to stay proceedings in the district court while an arbitrability issue is pending on appeal.”²⁹⁶ This assessment of the Second and Ninth Circuits’ holdings, however, is not entirely accurate. More accurately, the Second and Ninth Circuits have adopted a standard that grants discretion to the district court and the court of appeals to determine whether a stay is warranted.²⁹⁷ Furthermore, both circuits have held that courts should grant a stay only in exceptional circumstances because a stay may unnecessarily stall the district court’s proceedings and because both circuits determined that arbitrability is separate from the merits of the case.²⁹⁸ In fact, the Tenth Circuit later softened its assessment by recognizing that the Ninth Circuit emphasized in its analysis that the traditional stay analysis would allow for a case-by-case determination of whether a stay of the district court’s proceedings is warranted.²⁹⁹

The Tenth Circuit characterized the Seventh and Eleventh Circuits as holding that the district court or court of appeals should grant a stay of the district court proceedings “so long as the appeal is not frivolous.”³⁰⁰ Again, the opinions issued by Seventh and Eleventh Circuits do not fully support this characterization. These circuits have adopted a principle that effectively mandates a stay of the district court proceedings upon a motion by one of the litigants, thus making the frivolousness inquiry effectively irrelevant.³⁰¹ Nevertheless, the Tenth Circuit addressed the merits of each of the positions taken by other circuits.³⁰²

The Tenth Circuit ultimately concluded that a nonfrivolous § 16 appeal divests the district court of jurisdiction and requires the district court to grant a stay.³⁰³ The Tenth Circuit based its conclusion on four main premises. First, like the Seventh Circuit, the Tenth Circuit compared an appeal under § 16 of the FAA to an appeal from the denial of a qualified immunity claim because both of these appeals concern whether the district court has the authority to hear the case.³⁰⁴ The court noted that an appeal from the denial of a qualified

294. *See id.* (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982)).

295. *Id.*

296. *Id.*

297. *See supra* Parts III.A.1-2.

298. *See supra* text accompanying notes 154-57, 205.

299. *McCauley*, 413 F.3d at 1161.

300. *Id.* at 1160.

301. *See supra* text accompanying notes 258-59, 269-70, 275; Part III.B.1-2.

302. *See McCauley*, 413 F.3d at 1160-61.

303. *Id.* at 1162.

304. *Id.* at 1161; *see also supra* text accompanying notes 257-58.

immunity claim automatically divests the district court of jurisdiction “where the court did not certify the appeal as frivolous or forfeited.”³⁰⁵ Second, and more importantly, stays during interlocutory appeals are of great importance because “[t]he interruption of the trial proceedings is the central reason and justification for authorizing such an interlocutory appeal in the first place. When an interlocutory appeal is taken, the district court only retains jurisdiction to proceed with matters not involved in that appeal.”³⁰⁶ This conclusion rests upon the belief that arbitrability and the merits of the case are inseparable. Third, the Tenth Circuit reasoned that the district court should grant a stay because the failure to stay the proceedings ignores “the parties’ preference for non-judicial dispute resolution, which may be faster and cheaper.”³⁰⁷ Finally, failure to stay the proceedings “defeats the point of the appeal and creates a risk of inconsistent handling of the case by two tribunals.”³⁰⁸

The parties’ preference for a nonjudicial forum and the potential for inconsistent handling by two tribunals potentially tips the balance of frivolousness in favor of the party moving to compel arbitration, but this imbalance is not necessarily at odds with the policy behind the FAA or the U.S. Supreme Court’s policy of favoring arbitration. First, Congress enacted the FAA to encourage the enforcement of arbitration agreements.³⁰⁹ The high standard set by the Tenth Circuit helps further this policy of encouraging enforcement of arbitration agreements by limiting the flexibility a court may exercise in determining whether an appeal is frivolous and a stay unwarranted. Second, a determination of whether an appeal is frivolous must include the possibility of reversal on the issue of frivolity by a reviewing court.³¹⁰ Based on the judicial preference for construing arbitration agreements generously,³¹¹ a reviewing court is likely to determine that appeals from a motion denying arbitration are not frivolous. Thus, the possibility of reversal is usually low. Because of the low possibility of reversal and the last two rationales advanced by the Tenth Circuit in *McCauley*, the district court would have to give great

305. *McCauley*, 413 F.3d at 1161.

306. *Id.* (quoting *Stewart v. Donges*, 915 F.2d 572, 576 (10th Cir. 1990)).

307. *Id.* at 1162 (quoting *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997)).

308. *Id.* (quoting *Bradford-Scott Data Corp.*, 128 F.3d at 505).

309. *See supra* text accompanying notes 46-47.

310. Seventh Circuit Judge Richard Posner offered a similar formula-based approach relating to the granting of injunctions. *Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir. 1985); *see also* Gotanda, *supra* note 189, at 822, 825-26 (discussing the viability of this formula).

311. *See supra* Part II.C.

deference to a claim that an appeal would ultimately be determined not to be frivolous.

In *McCauley*, the Tenth Circuit held that the inquiry into frivolousness sufficiently protects against the use of interlocutory appeals for strategic advantages, such as stalling the litigation.³¹² The Tenth Circuit concluded that a district court should not declare an appeal frivolous until after the district court has taken an “affirmative step” (e.g., a hearing) to inquire into frivolousness, but once the district court has taken such an affirmative step, the district court may proceed to trial unless the court of appeals intervenes.³¹³

The Tenth Circuit’s analysis in *McCauley* adequately describes the role that the district court plays in determining whether an appeal is frivolous. The Tenth Circuit asserted that the district court should perform the proper balancing analysis, not implicitly as done in other cases addressing this criterion, but explicitly through the use of an “affirmative step.” In addition, the court accurately assessed the unique place that interlocutory appeals hold in the judicial process.

IV. Reconciling the Circuit Court Cases: A Solution for the Future

The proverbial bell cannot be unrung, and any analysis addressing arbitration must include ample respect for Congress’s goals underlying the FAA and for the current judiciary’s preference for enforcing arbitration agreements.³¹⁴ By enacting the FAA, Congress intended to encourage the enforcement of arbitration agreements and to reverse the judiciary’s historical hostility toward arbitration agreements.³¹⁵ Congress also sought to promote the use of an efficient business practice.³¹⁶ In addition, based partly on the policy goal of judicial economy, the courts have greatly expanded the reach of the FAA. Courts have accomplished this by generously construing arbitration agreements to encompass a wide array of disputes and by interpreting ambiguous issues in favor of arbitration.³¹⁷ Thus, district courts and appellate courts faced with the dilemma of whether to grant a stay of the district court’s proceedings pending an appeal of the arbitrability of the dispute under § 16 of the FAA should generally grant a stay unless compelling evidence suggests that the appeal is predominately motivated by an interest to stall the litigation or that the appellant is extremely unlikely to succeed. Moreover, a stay should

312. *McCauley*, 413 F.3d at 1162.

313. *Id.* (quoting *Stewart v. Donges*, 915 F.2d 572, 576 (10th Cir. 1990)).

314. *See supra* Part II.B-C.

315. *See supra* text accompanying notes 46-47.

316. *See supra* text accompanying notes 50-53.

317. *See supra* Part II.C.

only be denied after the district court has taken an affirmative step to address the success of the pending appeal. Enforcing arbitration agreements except in extreme circumstances promotes the efficient allocation of the parties' resources, furthers the policy of judicial economy, and protects the interests of all parties involved.

Interestingly, this standard of presumptively granting a stay unless there is a compelling justification to the contrary is likely the standard being enforced at the circuit level, even though it is not so explicitly stated. Regarding the circuits that have denied a stay of the district court proceedings, facts and circumstances in those cases suggested that the appellant was more interested in stalling the litigation than enforcing the arbitration agreement.³¹⁸ On the other hand, the circuits that have granted a stay had no extenuating circumstances that suggested anything other than that the parties truly wanted to enforce the arbitration agreements.³¹⁹

For example, in *Britton*, the Ninth Circuit denied a motion to stay the district court's proceedings.³²⁰ The defendant in *Britton* moved to compel arbitration only after it became apparent that his Fifth Amendment defense would not succeed and that the plaintiffs were not interested in a settlement.³²¹ When viewed in this light, applying the factors and analysis articulated in *C.B.S.* would most likely result in a refusal to grant a stay.³²² First, the defendant would have a difficult time showing irreparable harm if the stay was not granted because he was using arbitration primarily as a means to avoid litigation. Moreover, the defendant did not seek relief from the prospective harm of litigation until after it was apparent that litigation would likely be unsuccessful. Therefore, by denying the stay, the court would not be seen as denying the party the benefit of the bargain because the defendant was merely delaying his "awful day" in court.³²³ Second, the plaintiffs would face additional delays in finally resolving their claims. Thus, the plaintiffs could likely show an injury substantial enough to mandate that a stay should not be granted. Third, one of the motivating factors for the passage of the FAA was the quick resolution of disputes.³²⁴ Granting a stay in *Britton* would unnecessarily frustrate this goal because the litigation was already over a year

318. *See supra* Part III.A.

319. *See supra* Part III.B.

320. *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1408 (9th Cir. 1990).

321. *Britton*, 916 F.2d at 1407-08; *see also supra* text accompanying notes 139-42.

322. *See supra* text accompanying note 189 (quoting the four-prong test used in *C.B.S.*).

323. *See Weiner v. Gutfreund (In re Salomon Inc. S'holders' Derivative Litig.)*, 68 F.3d 554, 557 (2d Cir. 1995).

324. *See supra* text accompanying note 51.

old.³²⁵ Finally, the facts of *Britton* are inconclusive on whether there was a significant legal dispute, but the other factors outweigh all but the most definite claims. Overall, by not granting a stay in *Britton*, albeit for incorrect legal reasons, the court achieved the proper outcome by not allowing arbitration to be used primarily as a means to frustrate a party's ability to enforce his rights under an arbitration agreement and achieve justice.

Even though the Ninth Circuit's decision in *Britton* is justifiable, the Ninth Circuit's reasoning must still be the exception, not the rule. First, The Ninth Circuit has shown an unwillingness to enforce arbitration agreements.³²⁶ This type of hostility partially motivated Congress to pass the FAA.³²⁷ Thus, to allow courts the freedom to deny stays in all circumstances would frustrate not only the original intent of the FAA but also the current judiciary's policy of broadly interpreting and enforcing arbitration agreements. Moreover, decisions such as *Britton* lack an affirmative step before the court denies the stay, and without this step the reviewing court has no record on which to base its review. Furthermore, unless there is an affirmative step, there is no assurance that the parties' interests were adequately represented or protected.

The Second Circuit decisions in *In re Salomon* and *Motorola* also fit within this exception for denying a stay of the district court's proceedings. First, in *In re Salomon*, the parties had been litigating their dispute for three years before the employees moved to compel arbitration, and the court found that the employees made the motion only to prevent the litigation from proceeding.³²⁸ Under these facts, the rationales of speedy resolution of disputes and protecting the party desiring arbitration from incurring unnecessary expenses are not at their strongest. The FAA does not require the court to enforce a party's rights or protect a party's interests if that party is not willing to do the same. Thus, the court was correct in denying a stay based on the most likely intentions behind the motion to compel arbitration. Second, in *Motorola*, the defendants had "swindled" two corporations out of more than two billion dollars, made false accusations about the plaintiffs, and had only moved for arbitration after their litigation efforts were unsuccessful.³²⁹ Again, these defendants were not using arbitration to avoid the delays and costs of litigation

325. *Britton*, 916 F.2d at 1407.

326. See *supra* text accompanying note 85; see also *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994) (requiring subjective knowledge of the arbitration clause before compelling enforcement of the clause); *McGuinness & Karr*, *supra* note 82, at 61 ("Recent decisions in . . . the Ninth Circuit . . . show that the same judicial hostility ostensibly thwarted eighty years ago continues today, albeit in a more subtle — but equally hostile — form.").

327. See *supra* text accompanying note 47.

328. *In re Salomon*, 68 F.3d at 556-57.

329. *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 42, 44, 54 (2d Cir. 2004).

or in pursuit of arbitration's ability to afford nontraditional remedies. In fact, as the trial was complete, the defendants had already incurred all of the costs of litigation.³³⁰ Instead, the defendants attempted to use arbitration as a final effort to postpone a negative outcome and frustrate the plaintiffs' ability to find justice.

This is not to say, however, that the Seventh, Tenth, and Eleventh Circuits were completely correct in their assessment of the issue. None of these circuits created adequate safeguards to protect against a crafty litigant motivated, not by a genuine concern to compel arbitration, but by an interest in stalling the litigation. In fact, all of these circuits adopted what amounts to a policy of an automatic stay.³³¹ The definitions of frivolousness, or lack thereof, provided by these circuits do not allow for the courts to expand the inquiry from the merits of the appeal to the party's motives for bringing the appeal, the timing of the appeal, or the role the court should play in protecting the litigants.³³² Even so, the outcomes of these circuits' decisions probably would not have changed even if the circuits had applied this more exacting standard because, from the record, none of the parties seeking stays appeared to be motivated by anything other than a desire to enforce the original agreement.³³³

The Seventh, Tenth, and Eleventh Circuits also failed to fully develop the concept that the procedural posture of the party bringing the appeal should play a significant role in determining whether the court should grant a stay. The Seventh Circuit mentioned how failing to stay the district court's proceedings could effectively deny the party wishing to arbitrate the benefit of the bargain, but the court did not rely on this procedural posture rationale in reaching its conclusion.³³⁴ This, however, is one of the strongest rationales in support of granting a stay. First, Congress specifically enacted the FAA to ensure that parties wishing to arbitrate would not have to bear the delays and costs of litigation.³³⁵ Second, although a party being forced to litigate might

330. *Id.* at 44.

331. See Nickolas J. McGarth, Survey, *McCauley v. Halliburton Energy Services, Inc.: Treatment of a Motion to Stay Proceedings Pending an Arbitrability Appeal*, 83 DENV. U. L. REV. 793, 798 (2006) (concluding that the Seventh Circuit has "held that an *automatic* stay should be granted pending an arbitrability appeal" (emphasis added)). But see *Videsh Sanchar Nigam Ltd. v. Startec Global Commc'ns Corp. (In re Startec Global Commc'ns Corp.)*, 303 B.R. 605, 609 (D. Md. 2004) ("[A] stay is not automatically effected whenever an appeal is taken.").

332. *Videsh Sanchar Nigam Ltd.*, 303 B.R. at 609 (holding that the stay should be granted because the appeal does not appear to be "solely to stall litigation").

333. See *supra* Part III.B.

334. See *supra* text accompanying notes 237-51.

335. See *supra* text accompanying notes 51-52.

not recover its costs if arbitration is later determined to be appropriate, a party forced to arbitrate can most likely apply all costs associated with arbitration to litigation if litigation is later deemed appropriate.³³⁶ Finally, § 16 of the FAA accentuates this discrepancy by allowing for an immediate interlocutory appeal from decisions that are anti-arbitration and denying interlocutory appeals from decisions that are pro-arbitration.³³⁷

Nevertheless, the Tenth Circuit did make great progress toward a mechanism allowing for the proper application of a standard of presumptively granting a stay of the district court's proceedings unless there is a compelling counterjustification while protecting the rights of all parties to a dispute. First, the Tenth Circuit acknowledged the unique and important role of interlocutory appeals in the judicial process, and recognized the significance of Congress's authorization of an interlocutory appeal from a decision adverse to arbitration.³³⁸ Moreover, Congress enacted § 16 as a means to advance the conservation of judicial resources and allow parties quicker access to justice.³³⁹ Both of these facts bear heavily on what default rule the courts should follow because courts should act in a way consistent with these motives. Second, the Tenth Circuit recognized that an arbitration provision is simply another valid forum selection clause that courts should respect.³⁴⁰ Finally, the Tenth Circuit acknowledged that in the interest of protecting the rights of all parties involved in a dispute, the courts must take an affirmative step before denying a motion to stay the district court's proceedings.³⁴¹ The requirement of an affirmative step is arguably the Tenth Circuit's most important contribution to this debate. Requiring an affirmative step advances the goal of reversing judicial hostility toward arbitration by forcing courts to justify decisions adverse to arbitration. Theoretically, if a hearing is required before a court can deny a motion to stay the district court's proceedings, courts could deny a stay only when the fact pattern is skewed significantly in favor of such action.

336. *See supra* note 64 and accompanying text.

337. H.R. REP. NO. 100-889, at 36-37 (1988), *as reprinted in* 1988 U.S.C.A.N. 5982, 5983 ("[I]nterlocutory appeals are provided for when a trial court rejects a contention that a dispute is arbitrable under an agreement of the parties and instead requires the parties to litigate. In contrast, interlocutory appeals are specifically prohibited in new § 15 when the trial court finds that the parties have agreed to arbitrate and that the dispute comes within the arbitration agreement."). The 1988 congressional report refers to § 15 because that provision was not renumbered as § 16 until 1990. *See supra* note 59.

338. *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1161-62 (10th Cir. 2005); *see also supra* text accompanying note 306.

339. *See supra* notes 7-8 and accompanying text.

340. *McCauley*, 413 F.3d at 1162; *see also supra* text accompanying note 307.

341. *McCauley*, 413 F.3d at 1162; *see also supra* text accompanying note 313.

While no circuit has provided an adequate standard to determine if the district court's proceedings should be stayed pending an appeal from a denial of a motion to compel arbitration, the circuits have implicitly applied a workable standard. Even though there is an apparent circuit split, the circuits' differences can be easily reconciled when the different terminology is dissected. Finally, the Tenth Circuit came the closest to framing the proper inquiry in *McCauley*, but even that opinion falls short of the standard advocated for in this comment.

V. Conclusion

Courts should presumptively grant a stay pending an appeal under § 16 of the FAA. The objectives of the original drafters of the FAA and the drafters of § 16 of the FAA — encouraging the enforcement of an efficient business practice — support this conclusion because such an appeal is from a decision opposed to arbitration. Moreover, the current judicial policy favoring arbitration articulated by the U.S. Supreme Court also supports such an outcome.

Even so, stays should be discretionary rather than mandatory. As evidenced by the examples cited above, some situations call for the denial of a motion to stay in order to advance justice. Additionally, promoting arbitration must be balanced against the fact that once a final award occurs in arbitration, courts are generally unwilling to reverse the arbitrator's decision. By allowing courts some discretion, the rights of the party not wishing to arbitrate are protected.³⁴² Further, courts should read § 16 of the FAA as allowing a discretionary stay, rather than a mandatory stay, because § 3 of the FAA explicitly gives the district court authority to make arbitration decisions,³⁴³ and § 16 should be interpreted in a way consistent with § 3.³⁴⁴ Finally, a discretionary stay respects the drafter's intentions of placing arbitration agreements on the same footing as other contracts.³⁴⁵ A mandatory stay, on the other hand, would require courts to enforce arbitration agreements with a deference not given to other contracts, thus placing arbitration agreements on better footing than other contracts.³⁴⁶

342. Cf. *supra* notes 122-23 and accompanying text (describing the limited circumstances in which courts may vacate arbitration awards).

343. See 9 U.S.C. § 3 (2000).

344. The canon of statutory construction referred to as *in pari materia* dictates that inconsistencies in one statute can be resolved by looking at another statute on the same subject. BLACK'S LAW DICTIONARY 807 (8th ed. 2004).

345. See *supra* text accompanying note 4.

346. See *supra* text accompanying note 113.

The standard proposed by this comment strikes the appropriate balance between enforcing arbitration provisions and protecting the interest of all parties, especially those not wishing to arbitrate. Just as the drafters of the FAA believed, arbitration has proven to be a “low-cost,” fast alternative to litigation,³⁴⁷ and under this comment’s standard, the party wishing to compel arbitration has the opportunity to receive this benefit.³⁴⁸ Additionally, enforcing arbitration agreements as a form of a valid forum selection clause allows individuals in the marketplace to better predict their potential costs and plan accordingly.³⁴⁹ Additionally, a ruling to proceed to arbitration that is later reversed has fewer negative ramifications than a reversal of an order to proceed to trial because the cost and time devoted to arbitration can usually be applied to the litigation but the cost and time devoted to litigation greatly exceed that which is necessary for arbitration alone.³⁵⁰ Finally, because the stay is discretionary, a party not wishing to arbitrate is given protection against being bound by an unauthorized arbitration award. Thus, the parties face fewer hardships and judicial resources are conserved when the court errs in favor of arbitration as opposed to favoring litigation.

Most importantly, the interests of all parties are best protected by requiring the district court to take an affirmative step. First, an affirmative step guards against hasty action. Second, it requires courts to justify their decisions against arbitration and thus, advances the goal of reversing judicial hostility against arbitration. Third, an affirmative step encourages judicial inquiry into the motivations of the party moving to compel arbitration. These motivations may be gleaned from factors such as the timing of the motion or the extent of litigation completed before the motion. An affirmative step also provides the parties an opportunity to justify their positions. Most importantly, an affirmative step permits the party not wishing to arbitrate an opportunity to voice his or her concerns that he or she will be bound by an arbitration award from an erroneously ordered arbitration.

An affirmative step does not, however, require the reviewing court to re-determine the arbitrability of the dispute. The reviewing court need only

347. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (“[I]t is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies.”); *WARE*, *supra* note 12, § 2.43, at 89-90.

348. H.R. REP. NO. 68-96, at 2 (1924) (“[T]he party willing to perform his contract for arbitration is not subject to the delay and cost of litigation.”).

349. *See supra* notes 102, 124 and accompanying text.

350. *Jones*, *supra* note 62, at 375-76.

address the likelihood that the appeal from the denial to compel arbitration will be successful and the parties motivations for bringing the appeal. The reviewing court should consider such things as the procedural posture of the party, the policy behind the FAA of enforcing contracts, and the U.S. judiciary's policy of "rigorously enforcing" arbitration agreements. As discussed, a party wishing to compel arbitration probably can satisfy the traditional test, developed in *Hilton*, for determining if a court should grant a stay, while a party trying to avoid arbitration probably cannot.

Overall, a stay should be presumptively granted pending an appeal of a decision adverse to arbitration, but facts and circumstances that show that arbitration is only being used as a means to stall the litigation can rebut this presumption. Additionally, courts should not feel that they are required to grant a stay because justice may require the opposite result. In any scenario, courts should deny a motion to stay and proceed to trial only after the court has taken an affirmative step, such as a hearing, to inquire into the issue. This is most likely the standard that is currently being applied by the circuits. This comment asserts that the circuits should formally and explicitly adopt this standard in light of the FAA's history and the judiciary's current deference toward arbitration agreements.

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